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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

ORION HEALTHCORP, INC.
CONSTELLATION HEALTHCARE TECHNOLOGIES, INC.
NEMS ACQUISITION, LLC
NORTHEAST MEDICAL SOLUTIONS, LLC
NEMS WEST VIRGINIA, LLC
PHYSICIANS PRACTICE PLUS, LLC
PHYSICIANS PRACTICE PLUS HOLDINGS, LLC
MEDICAL BILLING SERVICES, INC.
RAND MEDICAL BILLING, INC.
RMI PHYSICIAN SERVICES CORPORATION
WESTERN SKIES PRACTICE MANAGEMENT, INC.
INTEGRATED PHYSICIAN SOLUTIONS, INC.
NYNM ACQUISITION, LLC
NORTHSTAR FHA, LLC
NORTHSTAR FIRST HEALTH, LLC
VACHETTE BUSINESS SERVICES, LTD.
MDRX MEDICAL BILLING, LLC
VEGA MEDICAL PROFESSIONALS, LLC
ALLEGIANCE CONSULTING ASSOCIATES, LLC
ALLEGIANCE BILLING & CONSULTING, LLC
PHOENIX HEALTH, LLC

-----X
Chapter 11
Case No. 18-71748 (AST)
Case No. 18-71749 (AST)
Case No. 18-71750 (AST)
Case No. 18-71751 (AST)
Case No. 18-71752 (AST)
Case No. 18-71753 (AST)
Case No. 18-71754 (AST)
Case No. 18-71755 (AST)
Case No. 18-71756 (AST)
Case No. 18-71757 (AST)
Case No. 18-71758 (AST)
Case No. 18-71759 (AST)
Case No. 18-71760 (AST)
Case No. 18-71761 (AST)
Case No. 18-71762 (AST)
Case No. 18-71763 (AST)
Case No. 18-71764 (AST)
Case No. 18-71765 (AST)
Case No. 18-71766 (AST)
Case No. 18-71767 (AST)
Case No. 18-71789 (AST)

Debtors.

-----X
(Joint Administration)

CONSTELLATION HEALTHCARE TECHNOLOGIES, INC.
AND NEW YORK NETWORK MANAGEMENT, L.L.C.,

Plaintiffs,

Adv. Pro. No. 18-08155

v.

KEVIN KELLY AND EDEL KELLY

Defendants.

-----X

KEVIN KELLY AND EDEL KELLY,

Third-Party Plaintiffs,

v.

BANK OF AMERICA, N.A., and
ELIZABETH KELLY,

Third-Party Defendants.

-----x

THIRD-PARTY COMPLAINT AND COUNTERCLAIM

Defendants/Third-Party Plaintiffs Kevin Kelly and Edel Kelly, by and through their undersigned counsel, Muchmore & Associates PLLC, as and for their Third-Party Complaint against Bank of America, N.A. and Elizabeth Kelly, and Counterclaim against Constellation Healthcare Technologies, Inc. and New York Network Management, L.L.C., allege the following:

Parties

1. Defendants/Third-Party Plaintiff Kevin Kelly (“Kevin”) is a resident of the State of New York.

2. Defendants/Third-Party Plaintiff Edel Kelly (“Edel”) is a resident of the United Kingdom of Great Britain and Northern Ireland.

3. Third-Party Defendant Bank of America, N.A. (“B of A”) is a national banking association headquartered in Charlotte, North Carolina.

4. Third-Party Defendant Elizabeth Kelly (“Elizabeth”) is a resident of the State of New York.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334, in that the action arises under, arises in, and/or relates to the Chapter 11 Cases. 13.

6. This adversary proceeding is a core proceeding to which the Court may enter a final judgment under 28 U.S.C. §157(b)(2)(A) and (E). 14.

7. This Court has personal jurisdiction over the Defendants. The Defendants filed the Proofs of Claim in these Chapter 11 Cases, thereby subjecting themselves to the equitable jurisdiction of this Court. 15.

8. Venue of this adversary proceeding in this Court is proper pursuant to 28 U.S.C. § 1409(a).

COUNT I

(EQUITABLE SUBORDINATION PURSUANT TO 11 U.S.C. § 510(c))

9. Third-Party Plaintiffs and Counterclaimants repeat, reallege, and incorporate by reference the allegations in their Proof of Claim and supporting exhibits, including their pleadings in the actions entitled *Kevin Kelly and Edel Kelly v. New York Network Management, L.L.C. and Elizabeth Kelly* (Index No. 522255/2016) and *New York Network Management, L.L.C. v. Kevin Kelly* (Index No. 522203/2016).

10. In or about 2016, Plaintiff New York Network Management, LLC (“NYNM”) received an offer (“the Offer”) from Plaintiff Constellation Healthcare Technologies, Inc. (“Constellation”) to purchase 100% of the membership interest in NYNM for approximately \$32 million (“the Sale”).

11. At the time the Offer was made, Elizabeth was the Managing Member of NYNM.

12. At the time the Offer was made, Elizabeth owned 88% of the membership interest in NYNM.

13. At the time the Offer was made, Kevin owned 3% of NYNM.

14. From 2006 through the time the Offer was made, Kevin worked full-time at NYNM.

15. At the time the Offer was made, Edel owned 3% of NYNM.

16. At the time the Offer was made, Cliona Sotiropoulos (“Cliona”) and Michaela Kircher (“Michaela”) each owned 3% of NYNM.

17. On or about September 1, 2016, Elizabeth presented Kevin, Edel, Cliona, and Michaela with a Membership Interest Redemption and Gift Agreement, stating that:

- A. Members are parties to that certain Amended and Restated Operating Agreement for the Company, dated as of January 1, 2010 (the "Operating Agreement")
- B. Each Member owns 3% of the issued and outstanding membership interest in the Company (the "Redeemed Units")
- C. Members desire to sell to the Company, and the Company desires to purchase from the Members, the Redeemed Units, in accordance with the terms and subject to the conditions set forth in this Agreement.
- D. The parties hereto agree and acknowledge that the Company may sell all or substantially all of its stock or assets (a "Transaction"), and that should a Transaction occur within twenty-four (24) months from the Effective Date, the Company's sole remaining stockholder, Elizabeth Kelly, would gift each Member the sum of \$250,000...

18. Cliona and Michaela signed the Membership Interest Redemption and Gift Agreement.

19. Kevin and Edel did not sign the Membership Interest Redemption and Gift Agreement.

20. On or about October 8, 2016, NYNM issued a letter to Kevin stating, "you refused to execute the Membership Interest Redemption Agreement... Therefore, pursuant to the terms and conditions of the Amended and Restated Operating Agreement, dated January 1, 2010, your membership interest is hereby redeemed..."

21. The purported redemption of Kevin's membership interest was a violation of Elizabeth's fiduciary duties and duties of good faith and fair dealing, intended to enrich herself personally.

22. NYNM has never issued any document to Edel purporting to have redeemed or terminated her membership interest in NYNM, nor has Edel executed any document purporting to terminate her membership interest in NYNM.

23. NYNM issued K1's ("the K1's") to Kevin and Edel from 2011 through 2016 indicating in Box J that each owned 3% of NYNM's membership interests.

24. The K1's indicated that Kevin received distributions of \$71,333 in 2011, \$61,000 in 2012, \$8,260 in 2013, \$158,337 in 2014, \$129,529 in 2015, and \$222,194 in 2016.

25. The K1's indicated that Edel received distributions of \$0 in 2011, \$0 in 2012, \$56,745 in 2013, \$68,070 in 2014, \$243,918 in 2015, and \$116,038 in 2016.

26. Kevin and Edel did not receive profit distributions from NYNM totaling the amounts stated in the K1's.

27. On or about December 14, 2016, Kevin initiated an action in the Supreme Court of New York, Kings County, entitled *Kevin Kelly v. New York Network Management LLC and Elizabeth Kelly*. Index No. 522255/2016, concerning the Offer and the Sale.

28. Also on December 14, 2016, NYNM initiated an action against Kevin in the Supreme Court of New York, Kings County, entitled *New York Network Management, LLC v. Kevin Kelly, et al.*, Index No. 522203/2016, concerning the Offer and the Sale.

29. On or about January 3, 2017, the Supreme Court of New York, Kings County issued an Interim Order allowing the Sale to proceed "upon the condition that five (5%) of the net proceeds received at the closing are held in escrow by the firm of Holland & Knight who represent plaintiff [NYNM] in the transaction."

29. On or about February 10, 2017, Edel was added as a Plaintiff to the action filed by Kevin.

30. On or about February 15, 2017, Kevin and Edel filed a Cross-Motion for Consolidation and a Preliminary Injunction, seeking to consolidate the above-referenced actions and to enjoin the Sale unless an additional 5% of the net proceeds were held in escrow for Edel's benefit.

31. On or about March 10, 2018, without notifying the Court, Kevin, or Edel, NYNM completed the Sale of its membership interest to Constellation.

32. NYNM and Elizabeth have not produced to Kevin, Edel, or their counsel any documentation of the negotiations or agreements concerning the Sale from prior to March 10, 2018.

33. NYNM and Elizabeth produced a Membership Interest Purchase Agreement dated March 10, 2018, referencing the above actions and requiring an escrow account to be established with

NYNM's counsel, Holland & Knight LLP, pursuant to the Orders issued therein, "as it may be amended".

34. B of A provided funding to Constellation and/or its subsidiary, NYNM Acquisition LLC, in connection with its purchase of NYNM.

35. B of A did not lend any funds directly to NYNM.

36. B of A was aware of the existence of above-referenced actions at the time it funded the Sale.

37. The dockets of the above-referenced actions, including all pleadings, orders, and motions therein, were publicly available on the New York State Court Electronic Filing System website at the time B of A funded the Sale.

38. B of A did not require that any portion of the funds it lent to Constellation for the Sale be held in escrow pursuant to an agreement that would ensure compliance with the Orders of the Supreme Court of New York, or that would prohibit disbursement of the escrow funds prior to a settlement or final adjudication of the above-referenced actions.

39. B of A did not confirm the accuracy or sufficiency of any amounts held in escrow pursuant to the above-referenced Order.

40. B of A did not require than any amount be held in escrow for the benefit of Edel in connection with the Sale.

41. Neither NYNM nor Constellation produced a copy of the original escrow agreement in relation to any escrow established with Holland & Knight LLP on the date of the Sale.

42. Wire records produced by NYNM and/or Constellation from the Sale indicate that \$500,000 was disbursed to Cliona, \$500,000 was disbursed to Michaela, and no funds were disbursed to Kevin or Edel.

43. No documents have been produced by NYNM or Elizabeth indicating why Michaela and Cliona received twice the amounts referenced in the Membership Interest Redemption and Gift Agreement.

44. Wire records produced by NYNM indicate that \$820,500 was issued to Holland & Knight LLP pursuant to a “Second Escrow Payment” concerning the above-referenced actions.

45. The \$820,500 initially held in escrow by Holland & Knight LLP was substantially less than 5% of the net proceeds of the Sale.

46. The \$820,500 originally held in escrow by Holland & Knight LLP was based on a calculation of “net sales proceeds” that treated more than \$4 million of Elizabeth’s personal income taxes as deductible costs of the transaction.

47. On or about March 24, 2017, Elizabeth, Michaela, Cliona, and Holland & Knight LLP entered into an Amended and Restated Escrow Agreement, with the stated intention “to amend and restate the Prior Agreement reflect the accurate amount of the Deposit *as determined by the Selling Members.*” (emphasis added).

48. Pursuant to the Amended and Restated Escrow Agreement, the amount held in escrow for the benefit of Kevin pursuant to the above-referenced Orders was reduced to \$445,315.

49. No amount was held in escrow by Constellation, NYNM, Elizabeth, B of A, or Holland & Knight LLP for the benefit of Edel, notwithstanding the pending motion to increase the amount required to be held in escrow to 10% of the net sales proceeds.

50. Constellation could have avoided a diversion of trust funds by requiring that a sufficient amount of the net sales proceeds be held in escrow to comply with the Orders of the Supreme Court of New York in the above-referenced actions.

51. B of A could have avoided a diversion of trust funds by requiring that a sufficient amount of the net sales proceeds be held in escrow to comply with the Orders of the Supreme Court of New York in the above-referenced actions.

52. Elizabeth could have avoided a diversion of trust funds by requiring that a sufficient amount of the net sales proceeds be held in escrow to comply with the Orders of the Supreme Court of New York in the above-referenced actions.

53. NYNM could have avoided a diversion of trust funds by requiring that a sufficient amount of the net sales proceeds be held in escrow to comply with the Orders of the Supreme Court of New York in the above-referenced actions.

53. As a result of the failure of Constellation, B of A, NYNM, and Elizabeth to ensure compliance with Orders of the Supreme Court of New York in the above-referenced actions, trust funds were not established in the amounts required by such Orders.

54. As a result of the foregoing, NYNM and Elizabeth were held in contempt by the Supreme Court of New York, Kings County.

55. From at least January 1, 2016 through the date of the Sale, NYNM's revenues exceeded its expenses.

56. From at least January 1, 2016 through the date of the Sale, NYNM's assets exceeded its debts.

57. From the date of the Sale through the sale of substantially all of NYNM's assets pursuant to Bankruptcy Code Sec. 363, NYNM's revenues exceeded its expenses.

58. From the date of the Sale through the sale of substantially all of NYNM's assets pursuant to Bankruptcy Code Sec. 363, NYNM's assets exceeded its debts, excluding any purported pledge of NYNM's assets as collateral to B of A for loans made to NYNM's corporate parents.

59. After the Sale, Paul Parmar of Orion Healthcorp., Inc. ("Orion") executed a document or documents purporting to pledge NYNM's assets as collateral for loans made by B of A to NYNM's corporate parents.

60. B of A was aware of the pendency of Kevin and Edel's claims at the time Paul Parmar executed any purported pledge of NYNM's assets as collateral.

61. B of A could not have relied in good faith on any such pledge of collateral because it was aware of Kevin and Edel's claims and failed to ensure a sufficient escrow was established for their protection at the time it funded the Sale.

62. B of A could not have relied in good faith on any such pledge of collateral because Paul Parmar lacked the authority to pledge substantially all of NYNM's assets as collateral for a loan to NYNM's corporate parents without first ensuring that NYNM had compensated Kevin and Edel for their converted membership interests and profit distributions, or establishing an escrow sufficient to satisfy any such obligations and comply with any Orders or Judgments in the above-referenced actions.

63. B of A could not have relied in good faith on any such pledge of collateral because it was aware that any loans related to such pledges were not made to NYNM or for the benefit of NYNM, and the circumstances surrounding Constellation's alleged purchase of all of NYNM's membership interest were still being actively litigated.

64. B of A could not have relied in good faith on any such pledge of collateral because it was complicit in the breach by NYNM and Elizabeth of their obligations to hold a sufficient portion of the net proceeds of the Sale in escrow for the benefit of Kevin and Edel.

65. Since Kevin and Edel's claims in this bankruptcy proceeding arise by virtue of an intentional breach of trust and conversion, they are not subject to equitable subordination pursuant to Bankruptcy Code Sec. 510(b).

66. Because Elizabeth was responsible for the breach of trust and conversion referenced above, her claims should be equitably subordinated to the claims of Kevin and Edel pursuant to Bankruptcy Code Sec. 510(c).

67. Because B of A was aware of Kevin and Edel's claims at the time it lent any funds to Constellation in relation of the Sale, because it failed to ensure compliance with the escrow provisions of the Orders authorizing the Sale, because it failed to conduct adequate due diligence or ignored the results of that due diligence, because it knew or should have known that the Initial Debtors' claims to

all the membership interest in NYNM was contested, because it knew or should have known that Paul Parmar lacked the authority to pledge substantially all of NYNM's assets for a loan that did not benefit NYNM, and because it did not lend any funds to NYNM, its claims to NYNM's assets should be equitably subordinated to Kevin and Edel's claims pursuant to Bankruptcy Code Sec. 510(c).

68. Because NYNM's bankruptcy estate has not been substantively consolidated with the estates of the Initial Debtors, and NYNM has at all times had sufficient assets to pay the debts of its own creditors, the claims of any creditors of the Initial Debtors to the assets of NYNM should be subordinated to the claims of Kevin and Edel and NYNM's own creditors.

WHEREFORE, Defendants/Third-Party Plaintiffs respectfully request judgment equitably subordinating the claims of B of A, Elizabeth, and any other creditors of the Initial Debtors to the claims of Kevin and Edel, together with such other and further relief as the Court deems just and proper.

Dated: Brooklyn, New York
January 18, 2019

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